APPEAL NO. 92010

On December 12, 1991, a contested case hearing was held in (city) Texas, to determine whether respondent (claimant below) aggravated his preexisting spondylolisthesis condition in a work-related truck accident. The hearing officer, (hearing officer), found that respondent aggravated his preexisting condition as a result of an injury he sustained in the truck accident, concluded that respondent sustained a compensable injury, and awarded him medical and income benefits, as and when they accrue, under the Texas Workers' Compensation Act. TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 *et seq.* (Vernon Supp. 1992) ("1989 Act"). Appellant (carrier below) contends that the hearing officer's determination is so against the great weight and preponderance of the evidence as to be manifestly unjust, and requests that the decision be reversed and a new decision rendered in its favor. Respondent requests us to affirm the hearing officer's decision.

DECISION

We affirm the hearing officer's decision.

In ruling on a question of factual sufficiency of the evidence, we consider and weigh all the evidence in the case and should set aside the hearing officer's decision if we conclude that the decision is so against the great weight and preponderance of the evidence as to be manifestly unjust. *See* In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

Under the 1989 Act, a "compensable injury" means "an injury that arises out of and in the course and scope of employment for which compensation is payable under this Act," and an "injury" means "damage or harm to the physical structure of the body and those diseases or infections naturally resulting from the damage or harm." Article 8308-1.03(10) and (27). An injury that aggravates a preexisting bodily infirmity is compensable provided over-exertion or an accident arising out of employment contributed to the incapacity. INA of Texas v. Howeth, 755 S.W.2d 534, 536-537 (Tex. App.-Houston [1st Dist.] 1988, no writ).

Spondylolisthesis is the forward displacement of one vertebra over another. Dorland's Illustrated Medical Dictionary, 27th Edition, p. 1567 (W. B. Saunders Company, 1988). An on-the-job injury which aggravates a preexisting spondylolisthesis condition has been held to be compensable under the prior workers' compensation law. Oswald v. Texas Employers' Insurance Association, 789 S.W.2d 636 (Tex. App.-Texarkana 1990, no writ); Texas Employers' Insurance Association v. Thornton, 556 S.W.2d 393 (Tex. Civ. App.-Fort Worth 1977, no writ).

On (date of injury), respondent was employed as a truck driver for (company) Trucking Company, and appellant was the employer's workers' compensation insurance carrier. On that day respondent drove his employer's flat bed tractor-trailer to a military installation in Texas to pick up a load of material for delivery to another military installation. As he was leaving the base with the fully loaded truck about 7:30 p.m., the right rear wheels of the trailer went into a ditch or culvert when he attempted to make a sharp right-hand turn

at a very slow speed. This caused the trailer to tip over on its right side and caused the tractor to flip to the right. There is conflicting evidence as to how far over the tractor went.

According to respondent, he was not wearing a seat belt and was thrown out of his seat and into the right-hand door hitting his neck and shoulder when the truck "flipped" to the right. When a pallet of material fell off the trailer, he said the truck "flipped back real quick" throwing him back across the cab and into the driver's side door. When everything settled, he said the tractor's right wheels were on the ground but the left wheels were six to eight feet off the ground. He got to the ground by sliding down the running board on the left side of the tractor. After about a minute, he said the back of his neck, shoulders, side, and leg started hurting. He also had a headache and was sick to his stomach. An ambulance took him to a nearby hospital where he stayed for 11 days. He said the doctors told him he needed a back operation.

Respondent testified that his back never gave him problems before his accident on (date of injury). The doctor who performed respondent's preemployment physical on January 21, 1991, certified that he was qualified in accordance with the Federal Motor Carrier Safety Regulations. Respondent has had several prior work-related injuries to his knee, shoulder, right arm, and right leg. There was no evidence of a prior injury involving his back.

Respondent admitted that he failed to disclose his prior work-related injuries on his employment application and in his answers to appellant's interrogatories. He also admitted that he failed to disclose a felony conviction for theft, a conviction for parole violation, and several misdemeanor convictions for bad checks on his employment application. These convictions were all within ten years of his current claim.

Mr. T testified that he took a job application from respondent about ten days before the accident, and that the day of the accident, (date of injury), was respondent's first day of work for the employer. He said the truck had not been moved when he arrived at the scene of the accident about one hour after the accident, but that respondent had already left the area. He testified to the accuracy of photographs of the truck that were taken after the accident. He said the truck was "just laid over;" that the wheels were 18 inches to 2 feet off the ground; and that a pallet was off of the truck. He said that he could not see how there could be any injuries from the accident because it could not have been a "flip over." He said a security guard told him the truck had just "laid over," and that the truck was going about three to five miles per hour at the time of the accident. When he saw respondent about one month before the hearing, he said respondent did not have any problem walking.

The video-taped statement of Mr. P, a paramedic, was introduced into evidence by appellant. Mr. P testified he had about a two-minute response time to the accident, arriving at the scene about 7:40 p.m. on (date of injury). He said the trailer was tilted over in a ditch and the tractor was sitting upright with no apparent damage to the tractor. When he asked the driver if he was hurt, the driver said "no," that he was just a little shook up and had been shaken around in the truck. The driver then told him he felt like he had been banged up a

little and had pain in his arm. Mr. P took the driver's blood pressure which was elevated and asked him if he wanted to go to the hospital. The driver said "no," that he was not hurt that bad. About ten minutes later, the driver told Mr. P that he felt worse, was having pain in his arm and leg, and agreed to be taken to the hospital. Mr. P put a splint on the driver's leg and took him to the hospital in the ambulance. The truck driver told him that the pain was from the truck "when it came up - - it slung him around in the cab a little bit." In response to the question "Do you have any reason to believe that there was no truth to the claims of injury he was making to you?" this witness said "No, I believe the man was having some pain." This witness also testified that the ditch or culvert the trailer wheels went into had a sharp drop-off of about four feet. It was his opinion, after having observed the truck in the ditch or culvert, that "when the trailer ran off that culvert it had to shake that tractor rig," and "it would have been a pretty good jolt."

Photographs in evidence show the back part of the trailer turned on its right side with the right double rear wheels completely within the ditch or culvert, and the front part of the trailer tilted to the right, but not as much as the back part. The tractor is connected to the trailer and is also tilted to the right, but not as much as the trailer, with the right wheels on the ground and the left tractor wheels raised off the ground. Straps hold most of the cargo on the trailer, except for a space in the middle where a large pallet of material fell off and lies upside down next to the trailer.

Following admission to the hospital on (date of injury), a myelogram and a CAT scan of respondent's cervical and lumbar areas were taken. Dr. G, M.D., the first doctor to examine respondent, gave a final diagnosis of Grade II Spondylolisthesis L5-S1. After his discharge from the hospital, respondent had follow-up visits with this doctor for back and leg pain. In a letter dated October 9, 1991, Dr. G stated "(Respondent's) preexisting condition could possibly have been aggravated in the accident which occurred on (date of injury). I do not feel that his spondylolisthesis is related to his on the job injury . . . ." This doctor referred respondent to Dr. D, M.D., an orthopedic surgeon, and recommended that respondent undergo back surgery when physical therapy failed to be of benefit.

Dr. D reported that respondent said his truck "flipped over and then flipped back up," examined respondent for complaints of "bad back trouble," and diagnosed spondylolisthesis L5 with degenerative changes.

In a report dated March 13, 1991, Dr. D stated:

> "At this time, it is possible that this patient has had an aggravation of this problem. He denies any previous symptoms with his back or difficulties. However, there are very marked changes in most of these on x-ray and most of these are consistent with old findings as well. I feel that he does have some definite problem with this and pain, and I feel that his spondylolisthesis probably has been aggravated . . ."

Dr. D said he would consider surgery if respondent continued to have difficulty.

In a later report dated April 17, 1991, Dr. D confirmed the following statements for a rehabilitation service:

"Based on all diagnostic testing completed, the degenerative changes and spondylolisthesis are not related to the injury of (date of injury). At the present, the only symptoms suggesting aggravation of the preexisting condition have been subjective complaints of pain and numbness. From the accident of blunt trauma to the right hip, it is unlikely that this caused severe back problems. At this time, surgical intervention is not recommended."

In a third report dated October 7, 1991, Dr. D stated:

"According to his history, it [spondylolisthesis] may have been aggravated by a truck accident. Thus, the degenerative changes in the lumbar spine or degenerative changes at L5 as well as the spondylolisthesis, in all medical probability, preceded any injury and that the injury could have only aggravated it some. It is also true that the pain and problem that he has or complained of could also have occurred without having any injury to his back."

Dr. G, M.D., an orthopedic surgeon who was the third doctor to examine respondent, noted in a report dated November 11, 1991, that respondent was in a truck accident where his truck flipped over and back upright again which jostled him around in the cab and he began to have lumbar pain and pain in his thighs. He also noted that X-rays showed a Grade III Spondylolisthesis. This doctor stated:

"By aggravation, I would have to have objective changes and all that we have is subjective complaints, so there is no way to prove that. It is well known that a Spondylolisthesis is present, asymptomatic can become symptomatic with an injury.

With the history that the patient gives me, assuming that it is an honest history, then I would assume this is an aggravation to a preexisting condition . . . ."

In the "Statement of the Evidence" portion of his decision, the hearing officer pointed out respondent's criminal convictions, false statements on the job application, and possible use of different social security numbers, and concluded that respondent was not a credible witness as a matter of law. Although the hearing officer cited no authority for his exceptionable proposition that respondent could be found to be not credible as a matter of law, respondent does not object to that conclusion on appeal. Instead, respondent points

to other evidence of record supporting the hearing officer's decision. Despite his conclusion concerning respondent's credibility, the hearing officer found that respondent suffered an aggravation to a preexisting condition as a result of his truck accident and concluded that the medical evidence established a compensable injury. Appellant asserts that the medical evidence does not prove by a preponderance that respondent's preinjury condition was aggravated by his on-the-job injury, and that "As repeatedly noted by the doctors, the only basis for that contention is the claimant's subjective complaints."

In Insurance Company of North America v. Kneten, 440 S.W.2d 52 (Tex. 1969), the Supreme Court of Texas held that despite the treating doctor's failure to say that a causal connection between a job-connected occurrence and the employee's disability was reasonably probable, recovery was allowed because of evidence of prompt onset of the employee's heart attack following an occurrence competent to affect adversely a defective heart. In that case, the injured employee testified as to the prompt onset of his attack following the occurrence at work, and his treating doctor testified that it was a "strong possibility" the occurrence at work precipitated the attack and that it "could have" been a contributing factor. The court noted that while the doctor's testimony was not as responsive and explicit as it could have been, he said nothing to rule out a medical relation between the work occurrence and the attack, nor did he negate the reasonableness of the finding of causal connection. The court then stated that "the jury was entitled to conclude as to the probability based upon all the evidence in the case." (Emphasis supplied). In Texas Employers Indemnity Company v. Etie, 754 S.W.2d 806 (Tex. App.-Houston [1st Dist.] 1988, no writ), the court held that the evidence established that a myelogram, which was required by a work injury, aggravated the claimant's preexisting back problems and caused incapacity. The claimant described the immediate onset and successive and continuous development of the symptoms following the myelogram, and his treating doctor testified that the myelogram was likely "the straw that broke the camel's back," an event that "added on to" the set of the claimant's preexisting conditions, causing them to become symptomatic. The court stated that "[t]he jury was entitled to infer from *all* the evidence that it was medically possible for the myelogram to have aggravated appellee's preexisting condition, so that it became symptomatic as a result of the myelography . . ."

In the present case, three doctors opined that respondent's spondylolisthesis could have or may have been aggravated by his truck accident. While it is apparent that the hearing officer did not find respondent to be a credible witness, and that the doctors relied on respondent's denial of prior back problems, description of the severity of the accident, and his complaints of pain after the accident in arriving at their opinions, the hearing officer had before him evidence concerning those matters relied on by the doctors which did not wholly depend upon respondent's credibility. This evidence consisted of the report of respondent's preemployment physical examination wherein no back problems were noted, the paramedic's statement that he believed respondent was having some pain on observing him immediately after the accident, the paramedic's statements that the accident "had to shake the tractor rig" and "it would have been a pretty good jolt," and the photographs of the tilted truck in the ditch with a large pallet that had fallen off which could have caused the truck to flip back in the other direction when it fell off. In addition, the hearing officer could

consider the absence of any report of prior back problems in arriving at his finding of aggravation of a preexisting condition. Howeth, supra. As the trier of fact, the hearing officer was entitled to infer from all the evidence that the accident aggravated respondent's preexisting condition. Kneten and Etie, supra. As noted, there was evidence apart from respondent's testimony that could support the hearing officer's findings and conclusions.

We find the evidence to be factually sufficient to support the hearing officer's decision and that his findings, conclusions, and decision are not so against the great weight and preponderance of the evidence as to be manifestly unjust.

The hearing officer's decision is affirmed.

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Robert W. Potts
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Philip F. O'Neill
Appeals Judge